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PERSONAL TORTS

by

Frank L. Branson*

I. NEGLIGENCE

IN the Survey period there were major developments in Texas negligence law in the areas of premises liability, gross negligence, prejudgment interest, liability for independent contractors, and the law under the automobile guest statute.

A. Premises Liability

In *Nixon v. Mr. Property Management Co.*¹ the Texas Supreme Court weakened the traditional common law entrant classification scheme for determining landowner liability.² The plurality opinion of Chief Justice Hill, however, relied upon a Dallas municipal ordinance and did not abolish the traditional landowner classification scheme outright.³ In *Nixon* an unknown assailant abducted a ten year old girl and carried her to an abandoned apartment where he raped her. The girl sued the owner of the vacant apartment building for damages. The district court granted the defendant's motion for summary judgment on the grounds that the defendant owed no duty to the plaintiff.⁴ The Dallas court of appeals affirmed the summary judgment,

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1. 690 S.W.2d 546 (Tex. 1985).

2. *Id.* at 549-51. The common law developed three classes of entrants to land. The landowner owes a different duty to members of each class. The landowner owes the least stringent duty to a trespasser, which is defined as one who comes upon the land without the possessor's permission or some other form of privilege. RESTATEMENT (SECOND) OF TORTS § 329 (1965). A landowner's only duty towards a trespasser is not to injure him willfully. 690 S.W.2d at 551 (Kilgarlin, J., concurring). The second class of entrants is the licensee. While a licensee enters the land with permission, he does so for his own purposes rather than for those of the possessor. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60 (4th ed. 1971). A landowner owes a licensee a duty "not to injure him by willful, wanton or gross negligence." *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974). The licensor's knowledge of a hazardous condition may raise a duty to warn the licensee or take action to make the condition reasonably safe if the licensee does not have knowledge of the danger. *Id.* A social guest is an example of a licensee. W. PROSSER, *supra* § 60. The third class of entrants is that of the invitee. An invitee is a person who enters the land on business that benefits or concerns the landowner. *Id.* § 61. An occupier has a duty to use ordinary care to protect invitees against hazards and to maintain reasonably safe premises. *J. Weingarten, Inc. v. Razey*, 426 S.W.2d 538, 539 (Tex. 1968).

3. 690 S.W.2d at 547-51.

4. *Id.* at 548.

holding that the plaintiff was a trespasser even though she did not enter the premises voluntarily.⁵

The Texas Supreme Court reversed. The plurality opinion relied upon a violation of a Dallas municipal ordinance to create a duty of the property owner.⁶ The court concluded that a genuine issue of material fact existed as to whether the defendant breached its duty of care by violating the city ordinance.⁷

In addition, the court examined the issue of proximate cause and stated that evidence existed to support the inference that the crime would not have occurred had the building been properly secured.⁸ The court noted that the assailant took the plaintiff directly to the vacant apartment, which indicated that he knew that the apartment was a convenient place to complete the assault.⁹

Addressing the issue of foreseeability, the court noted that the criminal conduct of a third party is usually a superseding cause that relieves a negligent person from liability.¹⁰ An exception exists, however, when the negligent party realized or should have realized that a third party would take advantage of such a dangerous situation.¹¹ The court concluded that the evidence of numerous violent crimes at the apartment complex raised a fact issue concerning the foreseeability of criminal activity.¹²

5. *Nixon v. Mr. Property Management Co.*, 675 S.W.2d 585 (Tex. App.—Dallas 1984), *rev'd*, 690 S.W.2d 546 (Tex. 1985). The Dallas court indicated its unwillingness to extend the duty of a property owner to a person who enters the owner's property without the owner's knowledge or consent regardless of whether the person acted of his own volition. *Id.* at 587. The court reasoned that the property owner could not be certain of the imposition of the duty or the action reasonably necessary to discharge the duty. *Id.*

6. 690 S.W.2d at 548. Section 27-11(a)(6) of the Revised Code of Civil and Criminal Ordinances of the City of Dallas states: (a) *Property standards*. An owner shall: . . . (6) keep the doors and windows of a vacant structure or vacant portion of a structure securely closed to prevent unauthorized entry. *Id.*

7. The court stated:

The unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injury to the class of persons to which the injured party belongs. A reasonable interpretation of this ordinance is that it was designed to deter criminal activity by reducing the conspicuous opportunities for criminal conduct. An ordinance requiring apartment owners to do their part in deterring crime is designed to prevent injury to the general public.

690 S.W.2d at 549.

8. *Id.*

9. *Id.*

10. *Id.* at 550.

11. *Id.* The court adopted the standard provided by § 448 of the RESTATEMENT (SECOND) OF TORTS:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS, § 448 (1965).

12. 690 S.W.2d at 550-51. *See, e.g.*, *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436, 439-41 (1980) (court affirmed jury award of damages to assault victim based on evidence of

Justice Kilgarlin, in a well-reasoned concurring opinion, urged the court to abolish entirely the traditional entrant classification scheme and adopt "a general duty of reasonable care under the circumstances."¹³ Justice Kilgarlin stated that the entrant classification scheme is outdated and that courts should not determine a landowner's liability based on the "visitor's artificially determined purpose of entry."¹⁴ Justice Kilgarlin used the facts of the *Nixon* case to demonstrate the potentially absurd results of the antiquated classification system.¹⁵ Because her assailant dragged the plaintiff across the street into the vacant apartment, she was technically a trespasser, while if she had lived in the apartments and her attacker had assaulted her in a common area, she would be either an invitee or a licensee.¹⁶

Justice Kilgarlin noted that fifteen states have rejected the common law approach.¹⁷ He perceives a trend toward abolishing the common law classification scheme as a result of the decreased importance of land ownership in our society.¹⁸ In conclusion, Justice Kilgarlin asserted that Texas should abolish the entrant classifications in premise liability since society's concern for human safety outweighs the historical purpose of the classifications, the prestige of property ownership.¹⁹

Justice McGee wrote a dissenting opinion²⁰ in which he argued that the defendant could not have reasonably foreseen the criminal conduct of the unknown assailant as a matter of law.²¹ Justice McGee also argued that the

high crime rate in neighborhood and reasonable foreseeability that landlord's failure to install a lock on front entrance would lead to this type of assault).

13. 690 S.W.2d at 551 (Kilgarlin, J., concurring). Justice Kilgarlin argued that such a duty would not extend to a trespasser who enters intending to commit a crime. *Id.* at 554.

14. *Id.* at 552.

15. *Id.* at 551-52.

16. *Id.*

17. *Id.* at 552. See *Smith v. Arbaugh's Restaurant*, 152 U.S. App. D.C. 86, 469 F.2d 97, 105, *cert. denied*, 412 U.S. 939 (1973); *Webb v. City of Sitka*, 561 P.2d 731, 732-33 (Alaska 1977); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 101-02 (1968); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308, 314 (1971); *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973); *Pickard v. City of Honolulu*, 51 Hawaii 134, 452 P.2d 445, 446 (1969); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So. 2d 367, 370 (La.), *cert. denied*, 429 U.S. 833 (1976); *Poulin v. Colby College*, 402 A.2d 846, 849-50 (Me. 1979); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43, 51-52 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639, 647 (1972); *Quellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631, 634 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 242, 352 N.E.2d 868, 871-72, 386 N.Y.S.2d 564, 568 (1976); *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Antoniewicz v. Reszcynski*, 70 Wis. 2d 836, 236 N.W.2d 1, 11 (1975).

18. 690 S.W.2d at 553 (Kilgarlin, J., concurring).

19. *Id.* at 554. Justice Spears separately concurred. He argued that liability should not be premised entirely upon the ordinance and that the court should adopt a new exception to the traditional classification scheme. Justice Spears, however, was unwilling to abolish completely the classification system, arguing that the categories of entrants aid juries in imposing liability consistent with the social policies underlying the classification scheme. *Id.* at 554. (Spears, J., concurring).

20. Justices Wallace and Gonzales joined the dissent.

21. 690 S.W.2d at 560 (McGee, J., dissenting). Justice McGee challenged the plurality's finding concerning previous occurrences of violent crime at the apartment complex. Justice McGee argued that the record indicated that only non-violent property crimes occurred following the purchase of the apartments by the defendant. He concluded that the defendant could not have reasonably foreseen a violent crime occurring as a result of his failure to lock the door of the vacant apartment. *Id.* at 557-59.

unlocked door on the vacant apartment was not the cause in fact of the plaintiff's rape because it could not be established that, but for the unlocked door, the crime would not have happened.²²

B. Exemplary Damages

In *Dyson v. Olin Corp.*²³ the Texas Supreme Court elaborated upon the definition of gross negligence enunciated in *Burk Royalty Co. v. Walls*.²⁴ In *Dyson* the supreme court focused on the mental attitude of the defendant.²⁵ The court rejected the court of appeals' "new and independent examination" of the peril created and focused solely on whether the acts or omissions of the defendant displayed the requisite disregard for others.²⁶ In a well-reasoned and enlightened concurring opinion, Justice Robertson questioned the current practice of allowing the courts of appeals to weigh all of the evidence in determining if the jury verdict is against the great weight and preponderance of the evidence.²⁷ Justice Robertson argued that appellate review of the factual sufficiency of evidence infringes upon the right to trial by jury.²⁸ Justice Robertson urged the supreme court to earnestly consider whether the court of appeals, in exercising its factual sufficiency review, is undermining the right to trial by jury.²⁹

In *Williams v. Steves Industries, Inc.*³⁰ the Austin court of appeals held

22. *Id.* at 556. Justice McGee cited the "but for" test for determining cause in fact as adopted by the court in *Kerby v. Abilene Christian College*, 503 S.W.2d 526, 528 (Tex. 1970).

23. 692 S.W.2d 456 (Tex. 1985).

24. *Id.* at 458-59; *Burk*, 616 S.W.2d 911 (Tex. 1981). The *Burk Royalty* court defined gross negligence as follows:

The essence of gross negligence is not the neglect which must, of course, exist. What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care. Such conduct can be active or passive in nature.

Id. at 922.

25. 692 S.W.2d at 457-58. The Texas Supreme Court rejected the court of appeals requirements that the plaintiff prove: (1) that the defendant knew of the existence of an unreasonable peril, and (2) that the defendant's acts or omissions demonstrated that he was indifferent to the safety of the plaintiff. 678 S.W.2d 650 (Tex. App.—Houston [14th Dist.] 1984), *rev'd*, 692 S.W.2d 456 (Tex. 1985).

26. 692 S.W.2d at 458.

27. 692 S.W.2d at 458 (Robertson, J., concurring). The court of appeals currently review the factual sufficiency of the evidence under the standard enunciated in *In re King's Estate*, 10 Tex. 662, 664-65, 244 S.W.2d 660, 661 (1951). In *King's Estate*, the court interpreted article V, § 6 of the Texas Constitution as giving the courts of appeals the right to review the sufficiency of the evidence. *In re King's Estate*, 150 Tex. 662, 664, 244 S.W.2d 660, 661. See TEX. CONST. art. V, § 6 (decisions of courts of appeals are conclusive on all issues of fact brought before the court).

28. 692 S.W.2d at 458-59. The right to trial by jury is guaranteed by article I, § 15 of the Texas Constitution.

29. 692 S.W.2d at 459. Justice Robertson concurred in *Dyson* because neither party raised the issue of the court of appeals' authority to review the sufficiency of the evidence. *Id.*

30. 678 S.W.2d 205 (Tex. App.—Austin 1984), *aff'd*, 29 Tex. Sup. Ct. J. 53 (Nov. 13, 1985).

that punitive damages are not available for the mere violation of a statute.³¹ To support a punitive damage award, the violation must not only "be unlawful but also of a wanton and malicious nature."³² The court held that when the only act constituting "heedless and reckless disregard for the rights of others" consisted of the defendant's permitting a person to drive his vehicle without a commercial driver's license, this was not sufficient to justify punitive damages as a matter of law.³³

The Texas Supreme Court affirmed.³⁴ The court held that the evidence was inadequate to support a finding of gross negligence based upon negligent entrustment when the lack of a drivers' license is the only alleged grossly negligent omission.³⁵ In reaching its decision, the court emphasized the limited usefulness of drivers' licenses in determining the competence of a driver.³⁶ Thus, the court concluded that the risk taken by the defendant in permitting a person to drive unlicensed was unreasonable, but not severe enough to allow a jury to find that the defendant did not care whether the driver harmed someone.³⁷

Two cases decided during the Survey period compared the defendant's gross negligence with the plaintiff's negligence. In *Anderson v. Trent*³⁸ the Dallas court of appeals refused to reduce an exemplary damage award by the percentage of the plaintiff's negligence.³⁹ The defendant argued that the court should reduce the exemplary damage award by the percentage of the plaintiff's contributory negligence, relying upon *Pedernales Electric Cooperative, Inc. v. Schultz*.⁴⁰ The Dallas court declined to follow *Pedernales*, stressing that the paramount purpose for awarding exemplary damages is to punish the defendant and not to compensate the plaintiff.⁴¹ Additionally, the court noted that Texas law has traditionally considered gross negligence to be distinct from ordinary negligence.⁴² Because gross negligence and ordinary negligence are fundamentally different, the Dallas court found the com-

31. *Id.* at 211.

32. *Id.*

33. *Id.* Justice Brady dissented, arguing that the fact that the defendant continued to permit his driver to drive without a license after the accident constituted a reckless disregard for the rights of others. *Id.* at 213 (Brady, J., dissenting).

34. *Williams v. Steves Indus. Inc.*, 29 Tex. Sup. Ct. J. 53, 55 (Nov. 13, 1985).

35. *Id.* The *Williams* court cited with approval *Webster v. Carson*, 609 S.W.2d 850 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ), agreeing that in order to support a gross negligence finding, the plaintiff must produce evidence of additional aggravating circumstances that show the extreme danger associated with entrustment. 29 Tex. Sup. Ct. J. at 55.

36. 29 Tex. Sup. Ct. J. at 55. The court noted that a number of reasons other than incompetence explain why a person might not have a driver's license, such as a careless failure to renew the license. *Id.*

37. *Id.* The court also noted that although the defendant permitted the driver to drive another eight or nine months without a license, no evidence existed that the defendant knew the driver to be an incompetent or dangerous driver. *Id.* at 56.

38. 685 S.W.2d 712 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

39. *Id.* at 713-14.

40. 583 S.W.2d 882 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

41. 685 S.W.2d at 714.

42. *Id.* See *supra* note 24 for a discussion of the difference between gross negligence and ordinary negligence.

parison of the two improper for purposes of reducing compensation.⁴³

The Dallas court of appeals later issued its opinion in *Jannette v. Deprez*.⁴⁴ In *Janette* the plaintiff was injured in a diving accident at an abandoned, water-filled quarry on the defendant's property. The jury found that the plaintiff was a trespasser and that the defendant was grossly negligent.⁴⁵ Based upon the jury's findings, the trial court rendered a take nothing judgment in favor of the defendant.⁴⁶

The court of appeals held that under the Texas Comparative Negligence Statute⁴⁷ a plaintiff's ordinary negligence may be compared with a defendant's gross negligence in determining whether the court should reduce or bar the plaintiff's claim for *actual damages*.⁴⁸ The court noted that under Texas law prior to the passage of the comparative negligence statute, a plaintiff's contributory negligence completely barred recovery, regardless of the defendant's gross negligence.⁴⁹ Additionally, the court stated that the enactment of Article 2212a⁵⁰ only served to abolish contributory negligence as a complete bar to recovery when the jury finds that the plaintiff was negligent to a lesser degree than the defendant.⁵¹ The court found no evidence of an intent by the legislature to eliminate consideration of plaintiff's negligence when the jury finds the plaintiff to be more negligent than the defendant.⁵² The court asserted that the prior law of contributory negligence controls except as preempted by the comparative negligence statute.⁵³

The court distinguished *Anderson*, stating that *Anderson* did not address the issue presented in *Jannette*: whether the plaintiff's negligence bars or reduces the plaintiff's recovery of actual damages when the defendant is guilty of gross negligence.⁵⁴ Additionally, the court declined to extend the pure comparative causation scheme of *Duncan v. Cessna Aircraft Co.*⁵⁵ to cases in which the defendant is guilty of gross negligence.⁵⁶

43. 685 S.W.2d at 714.

44. 701 S.W.2d 56 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)

45. *Id.* The jury found that the plaintiff's injuries resulted 65% from her own negligence and 35% from the defendant's negligence. *Id.*

46. *Id.*, slip op. at 2.

47. TEX. CIV. PRAC. & REM. CODE §§ 33.001-33.017 (Vernon Pam. Supp. 1986).

48. *Jannette*, 701 S.W.2d at 58.

49. *Id.* See, e.g., *Parrott v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969); *Sargent v. Williams*, 152 Tex. 413, 416-17, 258 S.W.2d 787, 789 (1953); *Schiller v. Rice*, 151 Tex. 116, 126, 246 S.W.2d 607, 610 (1952).

50. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1985) (now found in TEX. CIV. PRAC. & REM. CODE §§ 33.001-33.017 (Vernon Pam. Supp. 1986).

51. *Jannette*, 701 S.W.2d at 59.

52. *Id.*

53. *Id.*

54. *Id.*

55. 665 S.W.2d 414 (Tex. 1984) (allowing defendants in certain non-negligence actions to obtain jury allocation of damages based on the plaintiff's, defendant's and third parties' respective percentages of causation as determined by the jury).

56. *Jannette*, 701 S.W.2d at 59-60. The court refused to extend *Duncan's* pure comparative causation scheme for cases in which at least one defendant is liable on a theory "other than negligence" to cases in which a defendant is liable for gross negligence. *Id.* at 60. The court noted that gross negligence does not contain the element of intentional conduct required for application of *Duncan's* pure comparative causation scheme. *Id.*

C. Prejudgment Interest

In the landmark case of *Cavnar v. Quality Control Parking, Inc.*⁵⁷ the Texas Supreme Court authorized the recovery of prejudgment interest in some instances by successful plaintiffs in personal injury cases.⁵⁸ The court followed *Phillips Petroleum Co. v. Stahl Petroleum Co.*⁵⁹ and held that prejudgment interest is recoverable upon general equitable principles.⁶⁰ The court reasoned that an award of damages does not fully compensate a successful plaintiff in the absence of prejudgment interest because it does not reflect the plaintiff's lost opportunity to invest and earn interest on the amount of damages during the time of the occurrence and the time of the judgment.⁶¹ The court stated that its holding would remove existing incentives for defendants to delay and thereby serve to expedite both settlements and trials.⁶²

In reaching its decision, the court rejected dicta from *Watkins v. Junker*⁶³ to the extent that it prohibited recovery of prejudgment interest in personal injury cases.⁶⁴ The *Watkins* court justified its rejection of recovery of prejudgment interest in personal injury cases on the grounds that the measure of damages was not fixed at any particular time.⁶⁵ The court in *Cavnar*, however, noted that prejudgment interest has commonly been awarded in other cases involving unliquidated damages⁶⁶ and that no more uncertainty exists in a personal injury action than in other cases allowing prejudgment interest.⁶⁷ The court held that successful plaintiffs are entitled to prejudgment interest at the legal rate on damages that have accrued by the date of judgment.⁶⁸

D. Independent Contractors

The Texas Supreme Court took a traditional approach in *Redinger v. Living, Inc.*⁶⁹ by adopting the Restatement of Torts position⁷⁰ that a general

57. 696 S.W.2d 549 (Tex. 1985).

58. *Id.* at 552.

59. 569 S.W.2d 480 (Tex. 1978) (recognizing equity of compensating a claimant for prejudgment interest).

60. *Id.* at 485.

61. 696 S.W.2d at 552.

62. *Id.* at 554. The court noted that by awarding prejudgment interest at proximate market rates, the court does not create an incentive for the plaintiff to delay either. *Id.*

63. 90 Tex. 584, 587, 40 S.W. 11, 12 (1897).

64. 696 S.W.2d at 554.

65. 90 Tex. at 587, 40 S.W. at 12.

66. 696 S.W.2d at 553.

67. *Id.*

68. *Id.* In wrongful death and non-death personal injury cases, the court held that interest would begin to accrue six months after the date of the occurrence giving rise to the cause of action. *Id.* at 554. In survival actions, interest begins to accrue from the date of the decedent's death. *Id.* The interest rate is to be determined according to the provisions of TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 2 (Vernon Pam. Supp. 1986). Additionally, the court held that plaintiffs are not entitled to prejudgment interest for punitive damages and future damages. 696 S.W.2d at 554-55. Moreover, if the plaintiffs fail to segregate their past and future damages, they are not entitled to prejudgment interest on any of their damages. *Id.* at 555.

69. 689 S.W.2d 415, 418 (Tex. 1985).

contractor may be directly liable for failure to exercise reasonable care in supervising independent subcontractors. Living, Inc. was the general contractor on a building construction site. Redinger was an employee of the plumbing subcontractor. Living's superintendent ordered Baird, the dirt hauling subcontractor, to remove some dirt while Redinger was working a few feet away. During the course of moving the dirt, the tractor crushed Redinger's left index finger. The jury found Living fifty percent negligent for permitting Baird to move the dirt while Redinger worked in the area.⁷¹ The court of appeals reversed the judgment due to jury misconduct; the Texas Supreme Court reversed.⁷²

The supreme court noted that an owner, occupier, or general contractor ordinarily does not have a duty to ensure that an independent contractor performs his work in a safe manner.⁷³ The general contractor, however, may be held to a reasonable care standard if he exercises some control over the subcontractor's work.⁷⁴ The court thus adopted the rule stated in section 414 of the Restatement (Second) of Torts.⁷⁵

The Restatement rule applies when the employer retains some control over the independent contractor's work, but not enough control to create a borrowed servant relationship.⁷⁶ Additionally, the employer must retain more control than simply ordering the work schedule, inspecting progress, or receiving reports.⁷⁷ In *Redinger* the court found that Living had retained the right to control the sequence in which the independent contractor performed the work, and the right to prohibit work from being done in a dangerous manner.⁷⁸ The court held that Living had exercised a degree of control sufficient to impose a duty upon Living to exercise its supervisory powers with reasonable care.⁷⁹

In *Jones v. Southwestern Newspapers Corp.*⁸⁰ the plaintiff was injured by the negligent act of an independent contractor who delivered newspapers for the defendant. The plaintiff presented evidence at trial indicating that the

70. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

71. *Living, Inc. v. Redinger*, 667 S.W.2d 846, 853-55 (Tex. App.—Houston [1st Dist.] 1984), *rev'd*, 689 S.W.2d 415 (Tex. 1985).

72. 689 S.W.2d at 418. On a construction site, a general contractor is charged with the same duty as an owner or occupier to use reasonable care to keep the construction site in a safe condition. *Smith v. Henger*, 148 Tex. 456, 464, 226 S.W.2d 425, 431 (1950).

73. 689 S.W.2d at 418.

74. *Id.*

75. Section 414 of the Restatement (Second) of Torts provides:

One who entrusts work to an independent contractor, but who retains *the control of any part of the work*, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

RESTATEMENT (SECOND) OF TORTS § 414 (1965) (emphasis added).

76. 689 S.W.2d at 418.

77. *Id.*

78. *Id.*

79. *Id.* When an occupier merely visited the site to inspect the work and receive reports, the occupier had not exercised a sufficient degree of control to owe a duty toward the contractor. *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 448 (Tex. App.—Amarillo 1985, writ requested).

80. 694 S.W.2d 455 (Tex. App.—Amarillo 1985, no writ).

defendant was aware of the independent contractor's practice of driving on the wrong side of the street when delivering newspapers. The Amarillo court of appeals reversed the summary judgment in favor of the defendant, holding that a defendant may be liable when he knowingly employs a negligent independent contractor.⁸¹

E. Guest Statute

The supreme court declared the Texas Automobile Guest Statute⁸² unconstitutional in *Whitworth v. Bynum*.⁸³ Whitworth sustained injuries in an automobile accident while riding in Bynum's car. Whitworth sued Bynum, and the district court granted summary judgment in favor of Bynum on the basis that the guest statute barred Whitworth's claim. The court of appeals affirmed the summary judgment and upheld the constitutionality of the guest statute, relying upon *Tisko v. Harrison*.⁸⁴

The supreme court reversed and held that the guest statute was unconstitutional under the Texas equal protection clause.⁸⁵ The court concluded that the guest statute bears no rational relationship to its purpose and creates an irrebuttable presumption that all automobile passengers within the second degree of affinity or consanguinity to the driver act collusively in bringing suit against the driver.⁸⁶ The only dissenters were Chief Justice Hill and Justice McGee, who argued that the prevention of collusive lawsuits was a proper purpose for the statute and that the classifications created by the guest statute were rationally related to the purpose of preventing collusive lawsuits.⁸⁷

F. Texas Tort Claims Act

In *City of Denton v. Page*⁸⁸ the Fort Worth court of appeals held the city

81. *Id.* at 458.

82. TEX. REV. CIV. STAT. ANN. art. 6701 (Vernon 1977). The Texas Guest Statute is now found in TEX. CIV. PRAC. & REM. CODE § 72.001 (Vernon Pam. Supp. 1986) as follows:

A person who is related to the owner or operator of a motor vehicle within the second degree of consanguinity or affinity and who is being transported in the motor vehicle over a public highway of this state as a guest without payment for the transportation has a cause of action against the owner or operator of the motor vehicle for injury, death, or loss in an accident only if the accident was intentional on the part of said owner or operator or was caused by his heedlessness or his reckless disregard of the rights of others.

83. 699 S.W.2d 194 (Tex. 1985).

84. *Whitworth v. Bynum*, 679 S.W.2d 608, 610 (Tex. App.—Houston [1st Dist.] 1984), *rev'd*, 699 S.W.2d 194 (Tex. 1985); *see Tisko v. Harrison*, 500 S.W.2d 565 (Tex. Civ. App.—Dallas 1973, writ *ref'd n.r.e.*) (constitutionality of the guest statute upheld against an equal protection challenge).

85. 699 S.W.2d at 197. TEX. CONST. art. I, § 3. Article I, § 3 provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to separate public emoluments, or privileges, but in consideration of public services." *Id.*

86. 699 S.W.2d at 196.

87. *Id.* at 198 (Hill, C.J., dissenting). Although Chief Justice Hill asserted that the guest statute should stand under deferential scrutiny, he concluded by noting that he would vote for the repeal of the guest statute if he were a member of the legislature. *Id.*

88. 683 S.W.2d 180 (Tex. App.—Fort Worth 1985), *rev'd*, 701 S.W.2d 831 (Tex. 1986).

liable for damages to the plaintiff resulting from a fire in a barn.⁸⁹ The plaintiff in *City of Denton* leased a house from Melton. A barn was on the property; however, the lease did not include the barn as part of the rental property. After several suspicious fires, the City Fire Marshall inspected the barn, but failed to find two cans of gasoline stored there. The undetected gasoline exploded causing injury to the plaintiff. In his petition the plaintiff alleged that the City of Denton was negligent in failing to remove the gasoline cans from the barn, failing to warn the plaintiff of the dangerous condition, failing to ensure that the barn was secured against intruders, and failing to discover the gasoline upon inspection of the barn. The City of Denton argued that it could not be held liable on the basis of premises liability because it was neither an owner nor an occupier of the property. In affirming the trial court's judgment against the City of Denton, the court of appeals began by stating that this case was not a premises defect case.⁹⁰ Instead, the court found the City of Denton liable under the Tort Claims Act⁹¹ for injuries suffered as a result of the unsafe condition of the property.⁹²

The court found that the City of Denton was negligent in causing a dangerous condition of property that contributed to the plaintiff's injuries.⁹³ The court stated that since the city's negligence in failing to remedy the dangerous condition contributed to plaintiff's injuries, the city could be held statutorily liable if the court could find a private person liable.⁹⁴ Further, the court held that when a party satisfactorily pleads a cause of action based on some "condition"⁹⁵ of real property, governmental liability may exist to the extent that private liability would exist, despite the fact that the government unit neither owns, occupies, nor furnishes the property.⁹⁶ The supreme court has granted writ of error and has heard oral arguments on the *Page* case.⁹⁷

89. *Id.* at 188.

90. *Id.*

91. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Vernon Supp. 1985). Section 3 provides in part:

Each unit of government in the state shall be liable for money damages for . . . death or personal injuries so caused from some condition or use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable to the claimant in accordance with the law of this State.

Id. (now found in TEX. CIV. PRAC. & REM. CODE § 101.021.(2) (Vernon Pam. Supp. 1986) (in substantially similar language).

92. 683 S.W.2d at 188-89.

93. *Id.* at 189-90.

94. *Id.* at 190.

95. TEX. CIV. PRAC. & REM. CODE § 101.021(2) (Vernon Pam. Supp. 1986).

96. 683 S.W.2d at 188-89.

97. The Texas Supreme Court reversed, holding that because section 3 of the Texas Tort Claims Act does not create new duties of care and because the City of Denton was not in control of the premises, the City of Denton did not owe a duty of reasonable care to Page. *City of Denton v. Page*, 701 S.W.2d 831, 834-35 (Tex. 1986).

H. Worker's Compensation

In *Reed Tool Co. v. Copelin*⁹⁸ the Texas Supreme Court considered whether an employer who intentionally maintains an unsafe workplace may be found to have intentionally injured an employee. The court began its analysis by noting that the difference between negligent injury and intentional injury is "the specific intent to inflict injury."⁹⁹ The court noted that the weight of authority in most jurisdictions is that the concept of intentional injury does not include "gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct short of genuine intentional injury."¹⁰⁰ Additionally, the court noted that other state courts have held that the following activities do not constitute intentional injury sufficient to escape the liability limitations of worker's compensation systems: (1) intentional failure to provide a safe workplace; (2) intentional modification or removal of safety guards; (3) intentional violation of safety regulation; (4) intentional failure to train an employee to perform a dangerous job; and (5) requiring an employee to work long hours.¹⁰¹ The court concluded that unless an employer believes that his intentional failure to furnish a safe place to work will certainly cause injury, the employer's action does not rise to the level of intentional injury.¹⁰² Thus, the supreme court affirmed the trial court's summary judgment in favor of the employer.¹⁰³

II. MEDICAL MALPRACTICE

A. Statutes of Limitations

A number of cases have arisen during the Survey period concerning the constitutionality of the two-year statute of limitations contained in the Medical Liability and Insurance Improvement Act (hereinafter cited as "Article 4590i" or the "Act").¹⁰⁴ In *Nelson v. Krusen*¹⁰⁵ the Texas Supreme Court

98. 689 S.W.2d 404 (Tex. 1985).

99. *Id.* at 406. The Restatement defines "intent" as follows: "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965).

100. 689 S.W.2d at 406 (citing 2A A. LARSON, THE LAW OF WORKER'S COMPENSATION § 68-13 (1983)).

101. 689 S.W.2d at 406-07.

102. 689 S.W.2d at 407.

103. 689 S.W.2d at 408.

104. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1986). Section 10.01 provides:

Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

Id.

105. 678 S.W.2d 918 (Tex. 1984).

declared the two-year statute of limitations contained in article 4590i unconstitutional to the extent that it barred a plaintiff's cause of action before the plaintiff could reasonably have discovered his injury.¹⁰⁶ In holding the statute of limitations unconstitutional, the court relied upon the open courts provision of the Texas Constitution.¹⁰⁷ The court also recalled its holding in *Sax v. Votteler*,¹⁰⁸ in which the court stated that "the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right to redress."¹⁰⁹

Applying the *Sax* test, the court in *Nelson* stated that it would be unreasonable to expect a plaintiff to sue before he knew or had reason to know of his injury.¹¹⁰ The court reasoned that application of the two-year statute of limitations would require the impossible from the plaintiffs.¹¹¹ The court described such a result as "shocking" and "absurd" and declared the statute unconstitutional.¹¹²

In *Neagle v. Nelson*¹¹³ the supreme court also held the two-year statute of limitations contained in article 4590i unconstitutional to the extent that it barred a person's claim before he reasonably could have discovered his injury.¹¹⁴ In *Neagle* the plaintiff underwent an appendectomy in December 1977. During the operation, the doctor left a surgical sponge in the plaintiff's abdomen. Surgeons discovered the sponge in January 1980 when the plaintiff submitted to exploratory surgery after feeling a mass in his abdomen. The trial court granted summary judgment based upon the two-year statute of limitations.¹¹⁵ The court of appeals affirmed.¹¹⁶ The Texas Supreme Court reversed the summary judgment, reasoning that if the plaintiff's allegations were true, he could not have discovered his injury before the statute of limitations had run.¹¹⁷

The supreme court's majority opinions in *Nelson* and *Neagle* left unresolved the question of how courts should apply the statute of limitations contained in article 4590i when the plaintiff has discovered his injury within the two-year period.¹¹⁸ The well-reasoned concurring opinions of Justice Robertson and Justice Kilgarlin addressed this question.¹¹⁹ Justice Kilgar-

106. 678 S.W.2d at 919.

107. TEX. CONST. art. I, § 13.

108. 648 S.W.2d 661 (Tex. 1983).

109. *Id.* at 665-66. Additionally, in *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967), the Texas Supreme Court recognized the discovery rule. Under the *Gaddis* rule, the statute of limitations did not begin to run until the patient discovered or reasonably should have discovered his injury. *Id.* at 580.

110. 678 S.W.2d at 923.

111. *Id.*

112. *Id.*

113. 685 S.W.2d 11 (Tex. 1985).

114. *Id.* at 12.

115. *Id.*; TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1986).

116. 658 S.W.2d 258 (Tex. App.—Corpus Christi 1983), *rev'd*, 685 S.W.2d 11 (Tex. 1985).

117. 685 S.W.2d at 12.

118. *Id.*

119. *Id.* at 12-15.

lin stated that the legislature intended to abolish the discovery rule of *Gaddis v. Smith*¹²⁰ when it enacted article 4590i.¹²¹ Justice Kilgarlin urged that the court adopt a rule similar to that stated in *Hawkins v. Safety Casualty Co.*¹²² Under the *Hawkins* rule, the statute will not bar a late filing worker's compensation claimant if he can show good cause for filing late.¹²³ A claimant is not barred if he has prosecuted his claim with the degree of diligence that an ordinary person would exercise under similar circumstances.¹²⁴

Justice Robertson disagreed with Justice Kilgarlin's conclusion that article 4590i abolished the discovery rule.¹²⁵ Justice Robertson suggested that the court return to the discovery rule and hold that the two-year limitations period should begin to run from the date of discovery since the statute of limitations then would not be unconstitutional as applied.¹²⁶

In *Morrison v. Chan*¹²⁷ the Texas Supreme Court held that article 4590i abolished the discovery rule in medical malpractice cases.¹²⁸ In *Morrison* the plaintiff received radiation treatments for cervical cancer from the defendant. The defendant completed the final radiation treatment on February 13, 1980. In September 1980, the plaintiff discovered a hole between her bladder and vagina. The plaintiff filed suit against the defendant on October 6, 1982, two years and eight months after the last treatment. The trial court granted summary judgment for the defendant based upon section 10.01 of article 4590i.¹²⁹

In upholding the constitutionality of the two-year statute of limitations, the majority distinguished *Nelson v. Krusen*¹³⁰ and *Neagle v. Nelson*.¹³¹ The court noted the impossibility in both *Nelson* and *Neagle* for the plaintiff to have discovered his injury before the statute of limitations had run.¹³² In *Morrison* the plaintiff discovered her injury within the two-year period; thus, the plaintiff could have filed her suit within the specified time.¹³³

The court then examined the proper construction to give to the Act. The court noted that it must, to the extent possible, construe statutes as written and ascertain legislative intent from the writing itself.¹³⁴ Based upon the language of section 10.01 of article 4590i, the court concluded that the legislature intended to abolish the discovery rule in medical malpractice cases

120. 417 S.W.2d 577 (Tex. 1967).

121. 685 S.W.2d at 14 (Kilgarlin, J., concurring).

122. 146 Tex. 381, 384, 207 S.W.2d 370, 372 (1948).

123. 685 S.W.2d at 14 (Kilgarlin, J., concurring).

124. *Id.*

125. *Id.* at 12 (Robertson, J., concurring).

126. *Id.* at 13.

127. 29 Tex. Sup. Ct. J. 29 (Oct. 29, 1985).

128. *Id.* at 31.

129. *Id.*; TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1986).

130. 678 S.W.2d 918 (Tex. 1984).

131. 685 S.W.2d 11 (Tex. 1985).

132. 29 Tex. Sup. Ct. J. at 30. See *supra* text accompanying notes 105-17 for a discussion of the *Nelson* and *Neagle* cases.

133. 29 Tex. Sup. Ct. J. at 30.

134. *Id.* at 31.

covered by the Act.¹³⁵ The court barred plaintiff's recovery based on her failure to file suit within the eighteen months between discovery of her injury and the two-year statutory limitation period.¹³⁶

B. Statutory Limitation on Damages

In response to pressures from the insurance industry and the Texas Medical Association, the Texas Legislature, in the Medical Liability and Insurance Improvement Act of 1977, imposed a \$500,000 limitation on the civil liability of physicians or health care providers.¹³⁷ In *Detar Hospital, Inc. v. Estrada*¹³⁸ the Corpus Christi court of appeals declared unconstitutional that portion of the Act limiting the amount of damages that a patient may recover in a medical malpractice action.¹³⁹ In *Estrada* the plaintiff asserted that the liability limitations of sections 11.01-11.05 of article 4590i¹⁴⁰ violate the equal protection clauses of the federal and state constitutions.¹⁴¹

135. *Id.*

136. *Id.* A plaintiff must file suit within two years and seventy-five days of his last treatment unless the plaintiff's injury could not reasonably be discovered within the limitations period. *Desemo v. Gafford*, 692 S.W.2d 571, 574 (Tex. App.—Eastland 1985, writ ref'd n.r.e.). Moreover, the doctor's temporary absence from the state does not toll the statute of limitations. *Hill v. Milani*, 686 S.W.2d 610, 611 (Tex. 1985).

137. TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1986).

138. 694 S.W.2d 359 (Tex. App.—Corpus Christi 1985, writ requested).

139. *Id.* at 365-66.

140. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 11.01-11.05 (Vernon Supp. 1986). Sections 11.02-11.03 of article § 4590i provide:

Sec. 11.02

(a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed \$500,000.

(b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.

(c) This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the "Stowers Doctrine."

(d) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instruction to the jurors: Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.

Sec. 11.03.

In the event that Section 11.02(a) of this subchapter is stricken from this subchapter or is otherwise invalidated by a method other than through legislative means, the following shall become effective: In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability of a physician or health care provider for all past and future noneconomic losses recoverable by or on behalf of any injured person and/or the estate of such person, including without limitations as applicable past and future physical pain and suffering, mental anguish and suffering, consortium, disfigurement, and any other nonpecuniary damage, shall be limited to an amount not to exceed \$150,000.

Id. §§ 11.02-11.03.

141. 694 S.W.2d at 365.

The court began its equal protection analysis by noting that since this case involved neither a suspect classification nor a fundamental right,¹⁴² the court should apply the "rational basis" standard of review.¹⁴³ Under the rational basis standard, the court must determine whether the legislative purpose for implementing the limitation on recovery outweighs the tort litigant's right to redress.¹⁴⁴ The court found that the stated purpose of the liability limitation was to deter unmeritorious suits and to promote the availability of health care.¹⁴⁵ In holding that the liability limitations are not rationally related to the statute's stated purpose, the court asserted that the statute not only did not limit non-meritorious claims but that the availability of health care resulting from the encouragement of physicians to practice came at the expense of those claimants with meritorious claims.¹⁴⁶ *Estrada* presents the Texas Supreme Court, which in recent years has gained national recognition for its progressive attitudes, with an opportunity to consider the constitutionality of the liability limitation provisions of the Act.¹⁴⁷

C. *Res Ipsa Loquitur*

In *Martin v. Petta*¹⁴⁸ the plaintiff suffered a broken toe while hospitalized for a hemorrhoid operation. The plaintiff relied upon the doctrine of *res ipsa loquitur*, arguing that her injury was of such a character that it would not ordinarily occur without negligence and that the defendant had complete control of the instrumentality causing the injury. The defendant argued that *res ipsa loquitur* is inapplicable in medical malpractice cases.

The court of appeals accepted the defendant's argument that *res ipsa loquitur* does not apply in medical malpractice cases.¹⁴⁹ Section 7.01 of article 4590i specifically limits the use of *res ipsa loquitur* to those cases to which it had been applied as of the effective date of the Act.¹⁵⁰ The court stated that because Texas courts limited the use of *res ipsa loquitur* to cases in which the "alleged malpractice and injuries are plainly within the common knowledge of laymen" before the effective date of the Act, *res ipsa loquitur* was not

142. *Id.*; see *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Supreme Court held state statute to a stricter standard of review since the classification touched on a fundamental right).

143. 694 S.W.2d at 365.

144. 694 S.W.2d at 365; see also *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983).

145. 694 S.W.2d at 365; see TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(b) (Vernon Supp. 1986).

146. 694 S.W.2d at 366 (quoting *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978)). Additionally, in *Malone and Hyde, Inc. v. Hobrect*, 685 S.W.2d 739, 753 (Tex. App.—San Antonio 1985, no writ), the court declared the liability limitation provisions of § 11.02 unconstitutional as applied to a corporation operating as a pharmacy.

147. The Texas Supreme Court has also granted writ in *Baptist Hosp. of Southeast Texas, Inc. v. Baber*, 672 S.W.2d 296, 298 (Tex. App.—Beaumont 1984, writ granted), in which the Beaumont court of appeals declared § 11.02 unconstitutional. See Powers, *Personal Torts, Annual Survey of Texas Law*, 39 Sw. L.J. 93, 111-12 (1985).

148. 694 S.W.2d 233 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

149. *Id.* at 239.

150. TEX. REV. CIV. STAT. ANN. art. 4590i, § 7.01 (Vernon Supp. 1986). Section 7.01 provides as follows: "The common law doctrine of *res ipsa loquitur* shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of the effective date of the subchapter." *Id.*

applicable in this case.¹⁵¹

Justice Ashworth dissented,¹⁵² arguing that under the circumstances of this case, *res ipsa loquitur* should apply.¹⁵³ Justice Ashworth found compelling the fact that plaintiff placed herself under the complete control of the doctor and sustained a broken toe while unconscious. Justice Ashworth asserted that a fact issue existed as to whether the doctor's negligence caused plaintiff's injury and that the fact finder should resolve this issue.¹⁵⁴ Consequently, Justice Ashworth would have reversed the summary judgment in favor of the defendant and remanded the case for a trial on the merits.¹⁵⁵

D. Miscellaneous

In *Dennis v. Allison*¹⁵⁶ the Texas Supreme Court refused to hold a psychiatrist liable for breach of implied warranty to comply with the ethical standards of the psychiatric profession.¹⁵⁷ In *Dennis* the plaintiff was a long time patient of the defendant. The plaintiff flew to Dallas to consult with the defendant. While in Dallas, the defendant allegedly physically beat and sexually assaulted the plaintiff in her hotel room.

In rejecting the plaintiff's implied warranty claim, the supreme court noted that implied warranty theories arose as a means to make a seller an insurer for the safety of the product that he sold.¹⁵⁸ Moreover, the adoption of Restatement (Second) of Torts section 402A¹⁵⁹ and the Uniform Commercial Code's implied warranties¹⁶⁰ has led the supreme court to hold that "the protection of Texas consumers no longer requires the utilization of an implied warranty as a matter of public policy."¹⁶¹ The court noted that a cause of action for medical malpractice or assault and battery provides a patient with an adequate remedy in a case in which a physician sexually assaults the patient.¹⁶²

Justice Ray dissented, arguing that the supreme court should extend the

151. 694 S.W.2d at 239; *see, e.g.*, *Williford v. Banowsky*, 563 S.W.2d 702, 706 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); *Irick v. Andrew*, 545 S.W.2d 557, 559 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); *Rayner v. John Buist Chester Hosp.*, 526 S.W.2d 637, 639 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

152. 694 S.W.2d at 240 (Ashworth, J., dissenting).

153. *Id.*

154. *Id.*

155. *Id.*

156. 698 S.W.2d 94 (Tex. 1985).

157. *Id.* at 94-96.

158. *Id.* at 94-95. Texas originally adopted the implied warranty theory in *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 829-31 (1942), a food contamination case. The *Decker* court adopted the implied warranty theory because of problems of proof inherent in a contract or tort cause of action for contaminated food. *Id.* at 834. In *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967), the court extended the implied warranty theory to defective products that cause physical harm to persons. *Id.* at 789.

159. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

160. U.C.C. §§ 2-314, 2-315 (1977).

161. 698 S.W.2d at 95 (quoting *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 78 (Tex. 1977)).

162. 698 S.W.2d at 95-96; *see Cotton v. Kambly*, 101 Mich. App. 537, 300 N.W.2d 627, 629 (1980); *Roy v. Hartogs*, 85 Misc. 2d 891, 381 N.Y.S.2d 587, 589-90 (App. Div. 1976); *see also Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968) (court rejected a claim against an

implied warranty theory to professional services.¹⁶³ Justice Ray noted that in a pure service case, the statutory implied warranties of the Uniform Commercial Code are not available.¹⁶⁴ Justice Ray would extend the implied warranty concept so that a "professional service provider, at a minimum, impliedly warrants that he will not breach the ethical commandments of his calling in providing his service."¹⁶⁵

III. PRODUCTS LIABILITY

The Survey period did not produce any landmark developments in Texas products liability law. Texas courts decided, however, a number of noteworthy cases during the Survey period. These cases refine concepts shaped by recent major developments while raising additional questions for resolution.

A. Defect

During the Survey period plaintiffs continued their attempt to expand the concept of strict liability to achieve social policy goals which they claim the state legislatures and congress have failed to achieve. The two prominent targets of this attack have been handguns and cigarettes. There was one pertinent federal case reported during the period addressing the issue of whether a handgun is a defective product.

In *Patterson v. Gesellschaft*¹⁶⁶ the United States District Court for the Northern District of Texas held that a properly functioning handgun is not a defective product and granted the defendant's motion for summary judgment.¹⁶⁷ In *Patterson* armed robbers shot a convenience store clerk to death. His mother brought suit against the manufacturer of the handgun, alleging a defective design and a defective distribution system that made it too easy for criminals to obtain handguns.¹⁶⁸

optometrist for breach of warranty in selling and fitting contact lenses because the contact lenses were not sold to the general public as an end product through regular channels of trade).

163. 698 S.W.2d at 96-97 (Ray, J., dissenting). Justices Kilgarlin and Spears joined Justice Ray in dissent.

164. *Id.* at 96. Justice Ray would overrule *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977), to the extent that it eliminates the public policy rationale for the implied warranty theory in non-sale of goods transactions. 698 S.W.2d at 96.

165. 698 S.W.2d at 97. Justice Ray also stated that *Barbee v. Rogers*, 425 S.W.2d 342 (Tex. 1968) should be overruled to the extent it disallows a cause of action against a professional for breach of an implied warranty to abide by the ethical standards of the profession. 698 S.W.2d at 97.

166. 608 F. Supp. 1206 (N.D. Tex. 1985).

167. *Id.* at 1208. The court stated:

This claim is totally without merit and totally unsupported by legal precedent. It is a misuse of tort law, a baseless and tortured extension of products liability principles. And, it is an obvious attempt, unwise and unwarranted, *even if understandable*—to ban or restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures.

Id. (emphasis in original).

168. *Id.* The plaintiff claimed that the manufacturer defectively designed the handgun because the risks for danger outweighed the social utility. In addition, the plaintiff alleged a defect in the manufacturer's distribution system based on the ability of criminals to obtain handguns and misuse them. *Id.*

In *Patterson* the plaintiff admitted that the handgun did not malfunction. The plaintiff argued that if the handgun was unreasonably dangerous, the court could find the handgun to be defectively designed.¹⁶⁹ The plaintiff contended that Texas law does not require proof of a defect and that the jury should be allowed to apply the risk-utility test to any product.¹⁷⁰ In rejecting this argument, the court stated that under Texas law, the product must have a defect before the court will apply the risk-utility test and allow recovery.¹⁷¹ In this case, the court concluded that the gun was not defective because it functioned as it was intended to function.¹⁷²

The *Patterson* court noted that the plaintiff's theory was inconsistent with the risk-utility test because that test includes weighing the cost and practicality of a remedial design.¹⁷³ The court pointed out that the plaintiff offered no safer designs for handguns, nor would plaintiffs be able to do so because of the inherent dangerousness of a gun.¹⁷⁴ The court concluded that the plaintiff employed her argument in an attempt to eliminate handguns by use of the judicial system.¹⁷⁵ Additionally, the court rejected the plaintiff's distribution defect claim by recognizing that no such concept exists under

169. *Id.* at 1210. Additionally, the plaintiff admitted that the handgun possessed all essential safety features. *Id.*

170. *Id.* The plaintiff argued that the jury should determine whether the risks of death or injury outweigh the benefits of handguns. In arguing that the risks outweigh any utility from handguns, the plaintiff stated:

Handgun use results in 22,000 deaths every year in the United States and that medical care for gunshot victims costs approximately \$500 million each year. Although handguns constitute only thirty percent of all firearms sold in the United States, ninety percent of all cases of firearm misuse involve handguns. Most murders are sudden crimes of passion; without the ready availability of handguns, such crimes would be less likely. Proponents of manufacturers' liability further agree that handguns are almost useless for self-protection: a handgun is six times more likely to be used to kill a friend or relative than to repel a burglar, and a person who uses a handgun in self-defense is eight times more likely to be killed than one who quietly acquiesces. Thus, handguns, at least as distributed to the general public, are said to be defective.

Id. at 1210 (quoting Note, *Handguns and Product Liability*, 97 HARV. L. REV. 1912, 1914 (1984)); see also Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41 (1982).

171. 608 F. Supp. at 1211; see *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979) (in design defect cases, the plaintiff must prove that the product was defective, that the defect made the product unreasonably dangerous, and that the defect was a producing cause of the plaintiff's injuries).

172. 608 F. Supp. at 1211; see *Hulsebosch v. Ramsey*, 435 S.W.2d 161, 164 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ) (a rifle is not defective when it operates as it is intended to operate).

173. 608 F. Supp. at 1212.

174. *Id.* The court stated that a gun, by its very nature, must be dangerous and must have the capacity to discharge a bullet with deadly force. *Id.*

175. *Id.* at 1216. Additionally, the plaintiff argued that imposing liability upon the manufacturer would satisfy the loss spreading function of tort law. *Id.* at 1213. The court rejected this argument, stating:

The ability of a gun manufacturer to "spread the loss" is not a sufficient basis for requiring guiltless purchasers of guns to subsidize the actions of those who use firearms wrongfully. If it were, then we should simply hold—contrary to established principles—that all manufacturers who cannot produce a "fail-safe product" are insurers because of their ability to spread loss.

Id. The plaintiff also argued that the rejection of gun control by state legislatures strengthened

Texas law.¹⁷⁶

B. Duty

The warning defect cases decided during the Survey period frequently discussed the issue of duty. These warning defect cases analyzed the relationship of duty to causation. This approach was best demonstrated in *Ragsdale Brothers, Inc. v. Magro*.¹⁷⁷

In *Magro* the court's discussion of the manufacturer's duty to warn pertained to the court's holding on the causation issue.¹⁷⁸ The plaintiff suffered severe injuries to his hand while cleaning a "bodymaker" machine that produced beverage cans.¹⁷⁹ The accident occurred when a co-worker negligently restarted the machine while the plaintiff was still cleaning it.¹⁸⁰

the plaintiff's cause. The court, however, stated that gun control is a matter for legislative bodies and should not be imposed by the judiciary on an ad hoc basis. *Id.* at 1216.

176. *Id.* at 1214. The plaintiff relied upon *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 199 (E.D. La. 1983), *rev'd sub. nom.*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985), in which the district court held that the indiscriminate distribution of handguns to the public could constitute an ultrahazardous activity under Louisiana law. However, the *Patterson* court distinguishes *Richman* by stating that the principle involved in *Richman* is contrary to Texas law. 608 F. Supp. at 1214. Additionally, the United States Court of Appeals for the Fifth Circuit reversed *Richman* and directed that summary judgment be granted in favor of the manufacturer. 762 F.2d at 1275. In conclusion, the *Patterson* court noted:

[T]he unconventional theories advanced in this case (and others) are totally without merit, a misuse of products liability laws. It makes no sense to characterize any product as "defective" even a handgun—if it performs as intended and causes injury only because it is intentionally misused. Similarly, the claim that handgun manufacturers should be held responsible for keeping their products out of the hands of criminals—an admittedly impossible task—is an unsupported, tortured extension of products liability principles. Both theories are contrary to the established law that a manufacturer is not an insurer of its products; and both theories would, unless logic is abandoned, be applicable to other products besides handguns.

608 F. Supp. at 1216.

177. 693 S.W.2d 530 (Tex. App.—San Antonio 1985, writ requested).

178. The court reversed a lower court judgment for the plaintiff and held that there was sufficient evidence to support a finding of causation. The court found more than a scintilla of evidence that the manufacturer's failure to provide adequate instructions made the machine in question unreasonably dangerous. Apparently, the court considered the evidence sustaining the factual insufficiency point with respect to causation in its discussion of the appellant's matter of law point regarding its duty to warn. *Id.* at 540-41. The court noted that although sufficient evidence existed to rebut the presumption that the plaintiff (or his co-worker) would have heeded an adequate warning, the parties merely raised a fact issue as to the necessity of warning a user with expertise. The court, therefore, overruled the manufacturer's matter of law contention that it owed no duty to the plaintiff because the latter possessed expertise or demonstrated lax judgment. *Id.* at 541.

179. *Id.* at 533-34. The cleaning procedure for the "bodymaker" machine required the machine to be shut down while in its "continuous mode." Additionally, the operator must open a plastic window on the machine to permit access to the operating area of the machine. The machine will not operate in the continuous mode while the window remains open. Since proper cleaning requires that the machine operate on a limited scale while the window is open, it is possible to do so by changing the machine to the "inch mode." *Id.*

180. *Id.* at 534. While the plaintiff was cleaning the machine, a co-worker changed the machine to the "inch mode" and started the machine's motor. A piston forced down on the plaintiff's hands and caused the plaintiff's injuries. *Id.* The co-worker later testified that he activated the machine while the plaintiff's hands were inside it because he failed to pay attention to the plaintiff's actions. *Id.* at 538.

At trial, the jury found the machine to be unreasonably dangerous because the defendant did not provide adequate instructions on the safe operation of the machine. The jury also found that such failure was a producing cause of the plaintiff's injuries.¹⁸¹ The court of appeals began its analysis by noting that the adequacy of a warning under the circumstances is a question for the jury.¹⁸² The court found that the evidence was legally and factually sufficient to support the jury's findings that the lack of an adequate warning rendered the machine unreasonably dangerous.¹⁸³

The court, however, sustained the defendant's factual insufficiency argument regarding the jury's findings that the failure to warn was a producing cause of the plaintiff's injury.¹⁸⁴ Testimony indicated that a warning would not have prevented the co-worker from activating the machine while the plaintiff was cleaning it.¹⁸⁵ The court stated that failure to provide an adequate warning is not a producing cause of a plaintiff's injuries when the plaintiff is an experienced operator of the machine and is aware of the potential danger.¹⁸⁶ The court concluded that since the accident would likely have occurred even with the warning, the jury's finding that the failure to warn was a producing cause of the plaintiff's injuries was against the great weight and preponderance of the evidence.¹⁸⁷

Magro was tried prior to the supreme court's implementation of a pure comparative fault scheme for products liability cases in *Duncan v. Cessna*

181. *Id.* at 534-35.

182. *Id.* at 535.

183. *Id.* at 535-39. The court observed that while conflicting evidence existed on this point, the law requires the court, in reviewing no evidence points to restrict its review to the evidence and inferences favorable to the judgment. See *Garza v. Alviar*, 395 S.W.2d 821, 824 (Tex. 1965); *In re King's Estate*, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951). Because more than a scintilla of evidence existed to support the jury's finding, the court rejected the legal insufficiency argument and resisted the temptation to substitute its findings for those of the fact finder. 693 S.W.2d at 538.

184. 693 S.W.2d at 538. The district court had defined producing cause for the jury as "an efficient, exciting or contributing cause, which, in a natural sequence, produced the . . . [occurrence]. There can be more than one producing cause." *Id.*

185. The contents of the advocated warning is an important factor in examining the *Magro* case. The alleged defect arose from the failure to warn that a second person may activate the machine. *Id.* at 539. The opinion is unclear as to whether the plaintiff ever proposed that the machine was defective for not having a warning to guard against activating the machine before confirming that no other persons were working on the machine. This ambiguity is important because the appellate court focuses more on the conduct of the individual who activated the machine than upon the conduct of the plaintiff who suffered injury as a result of the activation. *Id.* at 540-41.

186. *Id.*; see *Blackwell Burner Co. v. Cerda*, 644 S.W.2d 512, 516 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (if the person to whom a warning would be directed has knowledge of the danger, then the failure to warn is not a producing cause of the accident).

187. *Id.* at 539; see Keeton, *Products Liability Inadequacy of Information*, 48 TEX. L. REV. 398, 414 (1970), in which Professor Keeton states:

If, however, on the occasion of the damaging event the product was being misused in a way that would have produced the damaging event even if the product had not been defective, then the unreasonably dangerous condition of the product would not be a factual cause of the plaintiff's harm. The sole cause would be the misuse of the product.

Id. at 414.

*Aircraft Co.*¹⁸⁸ Thus, the *Duncan* comparative causation scheme is inapplicable to the facts presented in *Magro*. Under pre-*Duncan* law evidence of contributory negligence is a defense only if it rises to the level of misuse or assumption of the risk.¹⁸⁹ Thus, in a pre-*Duncan* case, the court would ask whether a defect existed and, if so, whether the defect caused damages.¹⁹⁰ The plaintiff's negligence would not be relevant unless it rose to the level of misuse or assumption of the risk.¹⁹¹ Although not explicitly stated, the *Magro* court apparently believed that the negligence of the co-worker amounted to an unforeseeable misuse of the product. The *Magro* court analyzed the appellant's matter of law point regarding foreseeability and held that a fact issue was raised on this point, which constituted an essential element of the manufacturer's misuse defense.¹⁹² The court noted that the trial court had submitted an issue on misuse¹⁹³ and that upon retrial the matter would, if properly predicated, be treated in terms of a contributory negligence issue.¹⁹⁴

*Rego v. Brannon*¹⁹⁵ presents an interesting counterpoint to the *Magro* analysis of factual sufficiency on the issue of causation in a warning case. In *Rego* the manufacturer of a valve involved in a propane gas tank explosion argued that the evidence supporting the jury's apportionment of responsibility was factually insufficient because the plaintiff testified that he had not read the warning carefully. The valve manufacturer contended that this testimony was sufficient to refute the assertion that its failure to place a specific warning on its valve caused the accident.¹⁹⁶ Unlike the *Magro* court, the *Rego* court recognized the jury's exclusive right to accord weight to the evidence, refused to substitute its judgment for that of the jury, and upheld the jury finding.¹⁹⁷

During this past year the United States Court of Appeals for the Fifth Circuit addressed the issue of causation in *Horak v. Pullman, Inc.*¹⁹⁸ The court upheld directed verdicts in favor of the manufacturers of a railroad car and outlet gate that the plaintiff alleged were defective due to the manufacturer's failure to warn of the consequences of an improper opening of the

188. 665 S.W.2d 14 (Tex. 1984). *Magro* was tried during July 1982. *Duncan's* pure comparative causation scheme applies to cases tried after July 13, 1983. 693 S.W.2d at 533.

189. *First Int'l Bank v. Roper Corp.*, 686 S.W.2d 602, 603 (Tex. 1985).

190. *Id.* at 605. Even the post-*Duncan* analysis would most likely not change the *Magro* result. In order to uphold the jury's comparative causation findings, sufficient evidence must exist to support a finding that the defect caused the plaintiff's injury.

191. *Id.* at 603.

192. 693 S.W.2d at 541.

193. *Id.* at 542.

194. *Id.* (citing *Duncan v. Cessna Aircraft Co.*, 655 S.W.2d at 429).

195. 683 S.W.2d 677 (Tex. App.—Houston [1st Dist.] 1984, no writ).

196. *Id.* at 681. The plaintiff had apparently left a filled propane gas tank in the rear of his vehicle on a hot summer day. The valve in question responded appropriately, bleeding pressure in the tank by automatically releasing propane gas. Unfortunately, the gas was released into the automobile and when the plaintiff entered the car that evening and struck a match, the gas ignited.

197. *Id.* at 681.

198. 764 F.2d 1092 (5th Cir. 1985).

gate.¹⁹⁹ Applying the Fifth Circuit standard for review,²⁰⁰ the court held that the evidence conclusively established that the plaintiff knew of the risks posed by the product, thereby eliminating any dispute as to the factual basis of the manufacturer's affirmative defense.²⁰¹ The Fifth Circuit reiterated its earlier position that the operator's unawareness of the risk is a crucial element of the duty to warn.²⁰² The court reasoned that the failure to demonstrate a causal connection between injuries sustained and the lack of warning has contributed in part to the generally held view that no duty to warn exists when the party who would receive the warning has actual knowledge of the risks posed by the product.²⁰³

In *Alm v. Aluminum Co. of America*²⁰⁴ the plaintiff suffered an eye injury when a bottle cap blew off a soft drink bottle. The plaintiff sued the retailer, the bottler, and the designer of the bottle capping process.²⁰⁵ The plaintiff contended that Alcoa, the designer/manufacturer of the bottle capping machine, failed to warn him adequately that a defectively applied bottle cap may blow off and cause serious personal injury.²⁰⁶ The court of appeals held that while Alcoa had a duty to warn the bottler of potential dangers, this duty did not extend to consumers.²⁰⁷ The court stated that Alcoa's duty to warn ended with the bottler because the bottler was in a better position to pass on warnings to consumers than Alcoa.²⁰⁸

199. *Id.* at 1094.

200. *Boeing Co. v. Shipman*, 411 F.2d 365, 368-69 (5th Cir. 1969) (en banc) (in review of evidence on motions for directed verdict, the court should consider all evidence, and if facts and inferences are so strongly in one party's favor such that no reasonable men could reach a contrary verdict, then granting the motion is proper).

201. 764 F.2d at 1096; *cf. Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 340 (5th Cir. 1984) (court held that defendant bears the burden of proving actual knowledge and remanded case because evidence in record was not conclusive).

202. *Id.* at 1097 (citing *Hagans v. Oliver Mach. Co.*, 576 F.2d 97, 102 (5th Cir. 1978) (applying Texas law)).

203. 764 F.2d at 1096.

204. 687 S.W.2d 374 (Tex. App.—Houston [14th Dist.] 1985, writ granted).

205. *Id.* at 377. The retailer and the bottler settled before trial.

206. *Id.* at 378. The plaintiff also contended that Alcoa negligently designed the bottle and cap and negligently recommended a visual inspection system instead of devising a fail safe system. The court found that a broad submission of the negligence and proximate cause issues made it impossible to determine which act of Alcoa the jury found negligent. *Id.*

207. *Id.* at 382. Although noting the lack of legal precedent in Texas for imposing a duty to warn on designers of a product not actually involved in the manufacturing process, the court pointed to three cases in which the Massachusetts Supreme Court accepted such a proposition. *Id.* at 379; *see Bernier v. Boston Edison Co.*, 403 N.E.2d 391, 395 (Mass. 1980); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188, 1191-92 (Mass. 1978); *McDonough v. Whalen*, 313 N.E.2d 435, 438-39 (Mass. 1974).

208. The court stated:

This is because Alcoa had no control over the labeling of the soft drinks. The bottler is the one possessing the adequate means to pass warnings on to consumers. A manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to give adequate warning. This may occur where an intermediate party is notified of the danger, or discovers it himself, and proceeds to deliberately ignore it and pass the product on without a warning.

687 S.W.2d at 389. Additionally, the court noted that the jury's finding that the bottler was negligent implied a finding that Alcoa's warning was adequate. *Id.* Nonetheless, the court reversed and remanded the case for a new trial based on the insufficiency of evidence for determining whether Alcoa breached its duty to warn the bottler. *Id.*

Justice Junell dissented. He argued that because the parent soft drink company, and not the bottler, controls the labeling of soft drink bottlers, the evidence was factually sufficient to support the jury's finding of negligence against Alcoa for failing to warn the plaintiff.²⁰⁹ The supreme court has granted writ of error on the warning issue.²¹⁰ The *Alm* case appears to be taken as authoritative by the Fifth Circuit. In *Leonard v. Aluminum Co. of America*,²¹¹ a case involving questions of law and fact strikingly similar to those in *Alm*, the Fifth Circuit accepted the *Alm* opinion as "a definitive statement of Texas law."²¹²

C. Instructions to the Jury

Despite the Texas Supreme Court's ruling in *Acord v. General Motors Corp.*,²¹³ appellate courts during the Survey period continued to discuss the subject of jury instructions. In *First International Bank v. Roper Corp.*²¹⁴ the Texas Supreme Court faced the issue of the propriety of a sole cause instruction. Noting that the instruction was the type of improper "surplusage" that the court had cautioned against in *Acord*, the court held that the trial court committed harmful error.²¹⁵ The court reasoned that the instruction was a comment on both the weight of the evidence and the case as a whole.²¹⁶

Later in the year, the Texas Supreme Court in *Woods v. Crane Carrier Co.*²¹⁷ observed that when courts use terms requiring definition more than once in a charge, it is preferred that the definition or instruction occur immediately after the general instructions required by part III of rule 226a²¹⁸ of the Texas Rules of Civil Procedure.²¹⁹ In *Woods* the jury confronted essentially two issues: the first issue concerned defective design and the second involved failure to warn.²²⁰ The court noted that although *Turner v. General Motors Corp.*²²¹ requires a definition for "unreasonably dangerous," the trial court did not define "unreasonably dangerous" specifically in conjunc-

209. *Id.* at 384 (Junell, J., dissenting).

210. 29 Tex. Sup. Ct. J. 5, 5 (Oct. 16, 1985).

211. 767 F.2d 134 (5th Cir. 1985).

212. *Id.* at 136.

213. 669 S.W.2d 111, 116 (Tex. 1984). The court stated: "We explicitly approve the Pattern Jury Charges issue and instruction for design defect cases, and disapprove the addition of any other instructions in such cases, however correctly they may state the law under § 402A of the Restatement (Second) of Torts." *Id.*

214. 686 S.W.2d 602 (Tex. 1985).

215. *Id.* at 604-05.

216. *Id.* at 605.

217. 693 S.W.2d 377 (Tex. 1985).

218. TEX. R. CIV. P. 226a, III.

219. 693 S.W.2d at 379.

220. *Id.* at 378. The first issue was whether the manufacturer defectively designed the product. The second issue, predicated on an affirmative finding to issue one, inquired as to causation. Issue three examined whether the defendant should have anticipated the danger. Issue number four inquired whether the failure to warn rendered the product unreasonably dangerous. *Id.*

221. 584 S.W.2d 844, 850 (Tex. 1979).

tion with the design defect special issues.²²² The definition, however, was given in conjunction with the failure to warn issue. The court specifically refrained from addressing whether the lower court committed harmful error by failing to give the "unreasonably dangerous" instruction with the design defect issue.²²³ The court implied that it could have been harmful if the jury had not reached the issue containing the definition of "unreasonably dangerous."²²⁴

In *Ford Motor Co. v. Pool*²²⁵ the Texarkana court of appeals addressed the procedure for jury instructions when the plaintiff presents evidence of both manufacturing and design defects to the jury. The court must separate the issues and instruct the jury only to the *Turner* risk-utility test²²⁶ in the defective design issue and only to the consumer expectancy test in the manufacturing defect issue.²²⁷ By separating the issues and their respective tests, the court eliminates the risk of the jury applying the wrong test to the evidence on an issue.²²⁸

In *Ragsdale Brothers v. Magro*²²⁹ evidence had brought the issue of a manufacturer's duty to warn before the jury, but the court refused to submit the defendant-manufacturer's requested instruction on duty to warn those with expertise to the jury. The San Antonio court of appeals held that the charge should have included an instruction on duty to warn²³⁰ and that, on retrial, the court should frame the instruction in terms of contributory negligence in accordance with *Duncan v. Cessna*.²³¹ This ruling was ancillary to the court's dispositive holding, and the supreme court has granted writ on the case. The court's observations on this point, therefore, are of questionable precedential value at this time.

D. Statutes of Limitations

The focus of attention in the area of limitations during the Survey period was on the "discovery rule"²³² and the applicable statute of limitations in a breach of warranty action. The Eastland court of appeals applied the "discovery rule" to a products liability case in *Corder v. A. H. Robins Co.*²³³ The

222. 693 S.W.2d at 378.

223. *Id.* at 378-79.

224. *Id.* at 379.

225. 688 S.W.2d 879 (Tex. App.—Texarkana 1985, writ granted).

226. *Turner v. General Motors Corp.*, 584 S.W.2d at 847. The *Turner* court set forth that in strict liability cases involving design defects, courts should instruct the jury to consider "the utility of the product and the risks involved in its use." *Id.*

227. 688 S.W.2d at 882.

228. *Id.*

229. 693 S.W.2d 530 (Tex. App.—San Antonio 1985, writ granted).

230. The requested instruction was as follows: "There is no duty to warn a group or class of users who possess special knowledge or expertise concerning the dangerous characteristics of a product." *Id.* at 542.

231. *Id.* at 542-43; see *Duncan*, 665 S.W.2d 414 (Tex. 1984).

232. The "discovery rule," first applied in *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967), provides that the statute of limitations does not begin to run until "the plaintiff learned of or in the exercise reasonable care and diligence should have learned of, the presence of a foreign object in the body." 417 S.W.2d at 580.

233. 692 S.W.2d 194 (Tex. App.—Eastland 1985, no writ).

plaintiff's physician fitted her with a Dalkon Shield intrauterine device in 1971. Plaintiff had the device removed in 1972 due to bleeding and cramping. The plaintiff unsuccessfully attempted to conceive a child during the next few years. The plaintiff consulted several physicians concerning the infertility problem, yet the plaintiff was unaware until 1980 of the association between her infertility and the Dalkon Shield.²³⁴ The plaintiff filed suit against the manufacturer of the Dalkon Shield in September, 1981.

The trial court granted summary judgment in favor of the defendant based upon the statute of limitations.²³⁵ In reversing the summary judgment, the court of appeals relied heavily upon *Mann v. A. H. Robins Co.*,²³⁶ a case in which the Fifth Circuit applied the "discovery rule" in a Dalkon Shield case.²³⁷ In *Mann* the court held that the statute of limitations did not bar plaintiff's suit since the plaintiff did not know the cause of her injury until more than two years after the date of her injury.²³⁸ Applying *Mann*, the Eastland court of appeals held that because the plaintiff did not know the true cause of injury until August, 1980, her suit, filed in September, 1981, was not barred by the statute of limitations.²³⁹

*Fitzgerald v. Caterpillar Tractor Co.*²⁴⁰ involved a personal injury action brought in terms of breach of an implied warranty of fitness. The Fort Worth court of appeals held that the plaintiff's cause of action accrued upon delivery of the product to the plaintiff's employer and not upon occurrence of the plaintiff's injury.²⁴¹ The plaintiff in *Fitzgerald* was a worker who allegedly was injured when the blade of a forklift disengaged and fell on his foot. The plaintiff's injury occurred on August 3, 1977; however, plaintiff did not file suit until July 30, 1981.²⁴² Realizing that his cause of action for strict liability was barred by the two-year limitations period,²⁴³ the plaintiff pursued a breach of implied warranty action²⁴⁴ and hoped the four-year limitations period would govern.²⁴⁵ The trial court granted the manufacturer's motion for summary judgment on the ground that, even under the four-year period of limitations provided by section 2.725 of the Texas Business and Commerce Code, plaintiff's cause of action was barred.²⁴⁶ The appellate court affirmed, observing that a breach of warranty under the section occurs

234. Although a doctor associated her problems with her use of the Dalkon Shield in 1979, the doctor did not communicate this information to the plaintiff.

235. *Id.* at 195. The court applied the limitations period found in TEX. CIV. PRAC. & REM. CODE § 16.003(b) (Vernon Pam. Supp. 1986).

236. 741 F.2d 79 (5th Cir. 1984) (applying Texas law).

237. *Id.* at 80-81.

238. *Id.* at 80-82; *see also* Grady v. Faykus, 530 S.W.2d 151, 153-54 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) ("discovery rule" applied in a case when plaintiff did not discover for more than two years that excessive radiation caused her injury).

239. 692 S.W.2d at 196-97; *see also* Wall v. Owens-Corning Fiberglass Corp., 602 F. Supp. 252, 255 (N.D. Tex. 1985) (asbestosis).

240. 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

241. *Id.* at 166.

242. *Id.* at 166.

243. TEX. CIV. PRAC. & REM. CODE § 16.003 (Vernon Pam. Supp. 1986).

244. TEX. BUS. & COM. CODE ANN. § 2.725 (Tex. UCC) (Vernon 1968).

245. *Id.* § 2.725(a).

246. 683 S.W.2d at 163.

when the manufacturer tenders delivery.²⁴⁷ Since the manufacturer delivered the forklift in question to the plaintiff's employer three years before the injury and over seven years before the plaintiff filed the lawsuit, the court upheld the trial court ruling.²⁴⁸

E. Breach of Warranty

During the Survey period courts continued to wrestle with the concept of breach of warranty in personal injury cases in an attempt to reconcile the action with the strict products liability concept. In *Bernard v. Dresser Industries*²⁴⁹ an injured pipeline worker sued the manufacturer of a pressure gauge used to test expansion joints, alleging that the gauge was not fit for its intended purpose. The plaintiff contended that the manufacturer breached an implied warranty of merchantability.²⁵⁰ Citing *Garcia v. Texas Instruments, Inc.*²⁵¹ the court observed that a cause of action unequivocally exists under the Uniform Commercial Code for personal injuries resulting from a breach of an implied warranty of merchantability.²⁵² Although noting that sufficient evidence existed to demonstrate that the gauge in question was "defective and deficient,"²⁵³ the court stressed that showing a defect is not necessary to establish a breach of implied warranty of merchantability.²⁵⁴ The plaintiff must merely prove that the goods are not "fit for the ordinary purposes for which such goods are used . . ."²⁵⁵ In *Boelens v. Redman Homes, Inc.*,²⁵⁶ however, the Fifth Circuit held that personal injury claims arising from breach of warranty are not cognizable under the Magnuson-Moss Warranty Act.²⁵⁷

F. Burden of Proof

In *Shipp v. General Motors Corp.*²⁵⁸ the Fifth Circuit considered whether a plaintiff must offer evidence addressing each possible criterion in the risk-utility balancing test in a design defect case.²⁵⁹ *Shipp* was a crashworthiness case in which the roof of a Pontiac Trans Am automobile collapsed on the plaintiff following a single rollover. General Motors contested the suffi-

247. *Id.* at 165-66.

248. *Id.*; see also *Wall v. Owens-Corning Fiberglass Corp.*, 602 F. Supp. 252, 255 (N.D. Tex. 1985). But see *Morton v. Texas Welding & Mfg. Co.*, 408 F. Supp. 7, 11 (S.D. Tex. 1976).

249. 691 S.W.2d 734 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.).

250. *Id.* at 734. TEX. BUS. & COM. CODE ANN. § 2.314 (Tex. UCC) (Vernon 1968).

251. 610 S.W.2d 456 (Tex. 1980).

252. 691 S.W.2d at 736-37.

253. *Id.* at 738.

254. *Id.*

255. *Id.*

256. 748 F.2d 1058, 1066 (5th Cir. 1984).

257. 15 U.S.C. §§ 2301-2312 (1982).

258. 750 F.2d 418 (5th Cir. 1985).

259. *Id.* at 421. These criteria include the usefulness and desirability of the product, the gravity and likelihood of injury from its use, the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive, the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs, and the expectations of the ordinary customer. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980).

ciency of evidence supporting the issues of product defect and causation. Upon appeal the Fifth Circuit rejected General Motor's contention that a plaintiff must offer evidence as to each criterion of the risk-utility test,²⁶⁰ observing that the Texas Supreme Court has never expressly required that a strict liability claimant prove each criterion of the balancing test.²⁶¹

General Motors also attacked the judgment on the ground that the plaintiff failed to prove that the defective roof design "legally" caused her injuries, arguing that in a crashworthiness case the defendant is only liable for "enhancement damages."²⁶² General Motors urged that the court follow the approach adopted by the Third Circuit,²⁶³ which requires the plaintiff to establish the nature and extent of the enhanced injuries.²⁶⁴ The Fifth Circuit rejected this invitation, observing that the Texas courts have not explicitly addressed the burden of proof in crashworthiness cases and that Texas law of comparative fault does not require the plaintiffs to meet an increased evidentiary burden.²⁶⁵ Under Texas law, a plaintiff must prove only that a defect was a producing cause of injury.²⁶⁶

G. Negligence of Plaintiff's Employer

In 1983 the Texas Supreme Court, in *Varela v. American Petrofina Co. of Texas, Inc.*,²⁶⁷ held that courts could not consider the negligence of the plaintiff's employer in third-party negligence actions when the employer subscribed to workers' compensation.²⁶⁸ *Erickson v. Harvey Hubbel, Inc.*²⁶⁹ raised the unsettled issue of employer's liability in the context of a strict products liability action as opposed to negligence.²⁷⁰ The United States Court for the Northern District of Texas rejected the plaintiff's invitation to extend the *Varela* exclusion to strict products liability actions.²⁷¹ Noting the absence of guidance from the Texas Supreme Court, the federal district judge indicated that he would apply *Duncan*²⁷² and treat the employer as a "settled tortfeasor" for *Duncan* apportionment purposes.²⁷³ This indication meant that the court would allow the defendant to advance evidence regarding the employer's contributory negligence, and the jury would be able to consider whether, and in what proportion, that negligence contributed to

260. 750 F.2d at 421.

261. *Id.* at 422.

262. *Id.* at 424. General Motors cited the definition of enhancement damages as "that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." *Larsen v. General Motors Corp.*, 391 F.2d 495, 503 (8th Cir. 1968).

263. *Huddell v. Levin*, 537 F.2d 726, 738 (3rd Cir. 1976) (applying New Jersey law).

264. 750 F.2d at 424.

265. *Id.* at 424-25.

266. *Id.* at 425.

267. 658 S.W.2d 561 (Tex. 1983).

268. *Id.* at 561-62.

269. 593 F. Supp. 1319 (N.D. Tex. 1984).

270. *Id.* at 1319.

271. *Id.* at 1320.

272. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

273. 593 F. Supp. at 1320.

cause plaintiff's damages.²⁷⁴ It should be noted that the Texas Supreme Court decided *Duncan* after *Varela* and that the same policy consideration for insulating a subscribing employer in a third party negligence action would no doubt exist in a third party strict product liability action.

*Herrera v. FMC Corp.*²⁷⁵ was a products liability case brought by an oil field worker against the manufacturer of an allegedly defective swivel joint. The court held that the negligence of the plaintiff's employer may be admitted on the issue of sole cause.²⁷⁶ In its pleadings the defendant manufacturer alleged that the sole proximate cause of the appellant's injuries was the abuse or misuse of its product. The appellate court held that the trial court properly permitted the manufacturer to present evidence showing that the plaintiff's employer had misused the product and was negligent in its use.²⁷⁷

H. Liability of Successor Corporations

The Austin court of appeals rejected the "product line" theory of imposing liability upon a successor corporation in *Griggs v. Capitol Machine Works, Inc.*²⁷⁸ The plaintiff filed a products liability suit against the appellee and a dissolved corporation bearing the same name for personal injuries resulting from a product manufactured and sold by the dissolved corporation. The appellee purchased the assets and "going business" of the dissolved corporation.

In his original petition, the plaintiff alleged that the appellee was liable because, as successor, the appellee had acquired the going business from the dissolved corporation in addition to the assets. On this theory, plaintiff asserted that appellee inherited the liabilities of the dissolved corporation, including any liability that the court might find in the case. The trial court granted defendant's motion for summary judgment.²⁷⁹ The plaintiff appealed.

In rejecting the "product line" theory of liability,²⁸⁰ the court of appeals began its analysis by discussing the rationale for this theory of successor corporation liability.²⁸¹ The court noted that the "product line" theory gen-

274. *Id.* at 1320.

275. 672 S.W.2d 5 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

276. *Id.* at 8.

277. *Id.* at 7-8.

278. 690 S.W.2d 287 (Tex. App.—Austin), writ ref'd n.r.e. per curiam, 701 S.W.2d 238 (Tex. 1985).

279. *Id.* at 290.

280. *Id.* at 290. The court cited a New Jersey case for the definition of the products line theory:

[W]here one corporation acquires all or substantially all the manufacturing assets of another . . . and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in the units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

690 S.W.2d at 291 (citing *Ramirez v. Amstead Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 825 (1981)).

281. 690 S.W.2d at 290-94. Several states have accepted the "product line" theory of liability. See *Rivers v. Stihl*, 434 So. 2d 766, 771-72 (Ala. 1983); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 33, 560 P.2d 3, 11, 136 Cal. Rptr. 574, 582 (1977); *Ramirez v. Amstead Indus., Inc.*, 86 N.J.

erally finds its support in three arguments:

- (1) [the successor corporation] *may* protect itself by purchasing insurance, the cost of which *may* be passed on to the consumer of the product;
- (2) [the successor corporation] is *presumed as a matter of law* to have knowledge of possible hazards existing in products manufactured and sold by its predecessor, with the incentive and capacity to improve the product and control the risk *in the future*;
- (3) it is *presumed* to benefit from the *assumed* goodwill and reputation engendered by the predecessor's product and should therefore bear the corresponding burden of any defect in that product.²⁸²

The court found this rationale fundamentally flawed because it imposes upon a successor corporation a duty that it cannot possibly perform: a duty to prevent the specific incident that is the subject of the lawsuit.²⁸³ Thus, the successor corporation becomes an insurer for the wrongs committed by its predecessor and, as such, does not further the underlying social policies of strict products liability.²⁸⁴

The Texas Supreme Court refused Griggs' application for writ of error, finding no reversible error.²⁸⁵ In its per curiam opinion, the supreme court stated that Griggs' failure to adhere to the summary judgment standards contained in *Houston v. Clear Creek Basin Authority*²⁸⁶ required refusal of the writ of error application.²⁸⁷ In conclusion, the court stated that its holding did not include a ruling on any of the petitioner's points of error.²⁸⁸ Thus, the precedential value of *Griggs* is questionable.

The Dallas court of appeals in *Suarez v. Sherman Gin Co.*²⁸⁹ similarly held that damages could not be recovered against a successor manufacturing corporation either under the "trust fund theory"²⁹⁰ or the "de facto merger

332, 431 A.2d 811, 824-25 (1981); *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106, 110-11 (1981); *Tift v. Forage King Indus., Inc.*, 108 Wis. 2d 72, 322 N.W.2d 14, 18 (1982).

282. *Griggs*, 690 S.W.2d at 291 (emphasis in original); see Barringer, *Expanding the Products Liability of Successor Corporations*, 27 HASTINGS L.J. 1305, 1322-32 (1976).

283. *Griggs*, 690 S.W.2d at 292. Additionally, the court stated that the "product line" theory is inconsistent with the duty established by § 402A of the RESTATEMENT (SECOND) OF TORTS. The court reasoned that the Restatement provision deals with situations in which "the circumstances and events preceding a plaintiff's injury are within the defendant's exclusive ability to control." *Griggs*, 690 S.W.2d at 292 (quoting RESTATEMENT (SECOND) OF TORTS 35 (comment a) (1965) (emphasis added by the court)).

284. *Griggs*, 690 S.W.2d at 292-93. The court concluded that decisions adopting the "product line" theory are result-oriented, relying incorrectly on § 402A. *Id.* at 293. The court also stated that *Griggs* was controlled by *Mexican Nat'l Construction Co. v. Middlegge*, 75 Tex. 634, 637, 13 S.W. 257, 259 (1890) (mere acquisition of land does not create liability for damages resulting from predecessor's use of land even though successor landowner continued the use).

285. *Griggs*, 701 S.W.2d at 238.

286. 589 S.W.2d 671 (Tex. 1979).

287. 701 S.W.2d at 238. Specifically, Griggs did not file a response to the defendant's motion for summary judgment, and thus, may not present any point on appeal that he did not first present to the trial court. *Id.*

288. *Id.*

289. 697 S.W.2d 17 (Tex. App.—Dallas 1985, no writ).

290. *Id.* at 19 (citing *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (1981)). The

doctrine."²⁹¹ The facts in *Suarez* indicated that an express agreement transferring liabilities to the successor corporation did not exist and that the transaction only involved cash. These two factors weighed strongly in the court's decision.²⁹² In a different factual setting, the court in *Wall v. Owens-Corning Fiberglass Corp.*²⁹³ found that the merger agreement in that case did transfer liabilities; the court thus denied the successor corporation's motion for summary judgment.²⁹⁴

Finally, in *Webb v. Rodgers Machinery Manufacturing Co.*,²⁹⁵ the Fifth Circuit addressed the impact of Texas choice of law principles in the context of a successive manufacturer's liability. The court held that where California had the most significant relationship with the defendant manufacturers, its law should apply since Texas has adopted the "most significant relationship test."²⁹⁶ The court noted that California is one of the jurisdictions that has adopted the "products line" theory.²⁹⁷

I. Asbestosis: Cause of Action or Increased Risk of Developing Cancer

In *Gideon v. Johns-Manville Sales Corp.*²⁹⁸ the Fifth Circuit held that Texas law permits an asbestosis victim to recover damages for the increased likelihood that he will develop cancer.²⁹⁹ The court noted that under Texas law, a plaintiff has only one cause of action for all damages resulting from the defendant's legal wrong.³⁰⁰ For example, an asbestosis victim may not split his cause of action and sue now for damages resulting from the asbestosis and later, if cancer develops, sue for cancer.³⁰¹ Texas law requires the plaintiff to present in one action all his claims for damage resulting from

equitable trust fund theory developed such that creditors of a defunct corporation could pursue assets of the corporation that had been distributed to shareholders. *Id.* at 19.

291. *Id.* at 20. The court relied on TEX. BUS. CORP. ACT ANN. art. 5.10 (B) (Vernon 1980), which states:

- B. A disposition of all, or substantially all, of the property and assets of a corporation requiring the special authorization of the shareholders of the corporation under Section A of this article:
 - 1) is not considered to be a merger of consolidation pursuant to this Act or otherwise; and
 - 2) except as otherwise expressly provided by another statute, does not make the acquiring corporation responsible or liable for any liability or obligation of the selling corporation that the acquiring corporation did not expressly assume.

292. 697 S.W.2d at 21.

293. 602 F. Supp. 252 (N.D. Tex. 1985).

294. *Id.* at 255.

295. 750 F.2d 368 (5th Cir. 1985).

296. *Id.* at 374; see *Gutierrez v. Collins*, 583 S.W.2d 312, 318-19 (Tex. 1979).

297. 690 S.W.2d at 291.

298. 761 F.2d 1129 (5th Cir. 1985).

299. *Id.* at 1137.

300. *Id.* The court stated that Gideon's suit must encompass all causes of action arising from the alleged breach of legal duty. Gideon's cause of action could not be split such that he could recover damages for one disease then later recover damages for any other disease that develops. Thus, Gideon's claim for damages must include all future damages. *Id.*

301. *Id.* The court cited only *Houston T. C. Ry. Co. v. Fox*, 106 Tex. 317, 320, 166 S.W. 693, 695 (1914) for this proposition.

exposure to asbestos.³⁰²

In order to recover for the increased risk of developing cancer, the plaintiff must present expert medical testimony that a "reasonable medical possibility" exists that he will develop an asbestos related cancer.³⁰³ In *Gideon* the court allowed the plaintiff to recover for the increased risk of developing cancer because a qualified physician testified that the plaintiff had a better than fifty percent chance of developing asbestos related cancer.³⁰⁴ In *Dartez v. Fibreboard Corp.*³⁰⁵ the court did not allow the plaintiff to recover for the increased risk of cancer because expert medical testimony established that the plaintiff would have a less than fifty percent chance of developing cancer if he stopped smoking cigarettes.³⁰⁶

IV. WRONGFUL DEATH AND SURVIVAL ACTIONS

The Survey period saw the Texas Supreme Court extend the recovery of nonpecuniary damages to all classes with beneficiaries under the wrongful death statute. Additionally, the supreme court apparently held that proof of physical injury is not a prerequisite to the recovery of damages for mental anguish.

In *Cavnar v. Quality Control Parking, Inc.*³⁰⁷ the Texas Supreme Court stated all classes of beneficiaries may recover nonpecuniary damages under the Texas Wrongful Death Statute.³⁰⁸ The court reasoned that no reasonable basis existed for differentiating recovery for a wrongful death injury arising under section 7.1004 from an injury resulting from the wrongful death of a child.³⁰⁹ Citing the landmark case of *Sanchez v. Schindler*,³¹⁰ the

302. 761 F.2d at 1137.

303. *Id.* at 1137-38. The court stated that Texas law requires a plaintiff to prove a future physical condition through expert medical testimony as to the reasonable probability that the condition is likely to occur. The plaintiff's burden of proof, preponderance of the evidence, requires more than a showing of possibility but not necessarily certainty. *Id.*; see *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 466 (5th Cir. 1985).

304. 761 F.2d at 1138.

305. 765 F.2d 456 (5th Cir. 1985).

306. *Id.* at 466. The *Dartez* court concluded that the plaintiff did not establish a reasonable medical probability of developing cancer. *Id.*

307. 696 S.W.2d 549 (Tex. 1985). *Cavnar* also overruled longstanding Texas practice and permitted prejudgment interest in personal injury cases. See *supra* notes 57-68 and accompanying text for a discussion of prejudgment interest.

308. 696 S.W.2d at 551. The Texas Wrongful Death Statute states that the wrongful death cause of action "is for the exclusive benefit of the surviving spouse, children, and parents of the deceased." TEX. CIV. PRAC. & REM. CODE § 71.004 (Vernon Pam. Supp. 1986).

309. 696 S.W.2d at 551-52. A majority of the appellate courts addressing this issue had held that non-pecuniary damages are recoverable by all classes of beneficiaries under the wrongful death act. See *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985) (parents may recover non-pecuniary damages resulting from the death of an adult child); *Channel 20, Inc. v. World Wide Towers Services, Inc.*, 607 F. Supp. 551, 556 (S.D. Tex. 1985) (widows may recover mental anguish damages resulting from the wrongful death of their spouses); *Missouri Pacific R.R. Co. v. Vlach*, 687 S.W.2d 414, 416-17 (Tex. App.—Houston [14th Dist.] 1985, no writ) (wife and minor children of deceased permitted to recover non-pecuniary damages); *Clifton v. Southern Pacific Transp. Co.*, 686 S.W.2d 309, 314 (Tex. App.—San Antonio 1985, writ granted) (widow and minor children may recover non-pecuniary damages); *Malone & Hyde, Inc. v. Hobrecht*, 685 S.W.2d 739, 749 (Tex. App.—San Antonio 1985, writ dismissed) (recovery of non-pecuniary damages not limited to parents recovering for the death of

court held that adult children are entitled to recover damages for mental anguish resulting from the wrongful death of their mother.³¹¹

The supreme court in *Cavnar* arguably overruled the physical injury requirement since both the appellate court and supreme court affirmed the award of mental anguish damages without any reference to physical injury suffered by the Cavnar children. The more likely basis for these holdings, however, is the fact that a finding of gross negligence existed. Under Texas law this finding is a ground for recovery of mental anguish damages without further proof of physical injury.³¹²

Several courts of appeal, however, addressed the issue of mental anguish directly, with varying results. In *Missouri Pacific Railroad Co. v. Vlach*³¹³ the Houston court of appeals held that proof of physical injury is not a prerequisite to the recovery of damages for mental anguish.³¹⁴ The United States District Court for the Southern District of Texas reached the same result in *Channel 20, Inc. v. World Wide Towers Services, Inc.*³¹⁵ The Dallas court of appeals, however, did require proof of a physical injury as a prerequisite to recovery of mental anguish damages in *Air Florida, Inc. v. Zondler*³¹⁶ and *McKee v. Covert*.³¹⁷ Additionally, *Clifton v. Southern Pacific Transportation Co.*³¹⁸ may suggest a third alternative. In *Clifton* the court stated that "mental suffering proof requires a showing of psychic and/or physical injuries directly inflicted upon the mind of the claimant."³¹⁹ Thus, *Clifton* may permit the recovery of mental anguish damages without strict proof of physical injury.

In *Taylor v. Parr*³²⁰ the court held that the managing conservators of a handicapped child could not bring a wrongful death action because the stat-

minor children); *Air Florida, Inc. v. Zondler*, 683 S.W.2d 769, 772 (Tex. App.—Dallas 1984, no writ) (widow and children may recover non-pecuniary damages); *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex. App.—Houston [14th Dist.] 1984), *rev'd in part*, 28 Tex. Sup. Ct. J. 466, 468 (June 5, 1985). *Contra* *Piper Aircraft Corp. v. Yowell*, 674 S.W.2d 447, 661 (Tex. App.—Fort Worth 1984, writ granted) (*Sanchez* is limited to its particular facts).

310. 651 S.W.2d 249 (Tex. 1983).

311. 696 S.W.2d at 552-53.

312. *Sanchez*, 651 S.W.2d at 258 (Pope, C.J., dissenting).

313. 687 S.W.2d 414 (Tex. App.—Houston [14th Dist.] 1985, no writ).

314. *Id.* at 417. In reaching its result, the court relied upon its interpretation of *Sanchez* and found no requirement that a plaintiff prove such physical manifestations in order to recover for mental anguish. *Id.*

315. 607 F. Supp. 551 (S.D. Tex. 1985). The court based its result upon its interpretation of *Sanchez*. *Id.* at 556.

316. 683 S.W.2d 769, 773 (Tex. App.—Dallas 1984, no writ). The *Air Florida* court looked to pre-*Sanchez* law in determining that damages for mental anguish are only available if "the plaintiff showed an intentional tort, gross negligence, willful and wanton disregard, or an accompanying physical injury." *Id.* (citing *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 921 (Tex. 1981)). The *Air Florida* court concluded that *Sanchez* did not change prior law. 683 S.W.2d at 773. The court stated that it disagreed with the interpretation that *Sanchez* eliminated the physical injury requirement enunciated in *Baptist Hosp. of Southeast Texas, Inc. v. Baber*, 672 S.W.2d 296, 298-99 (Tex. App.—Beaumont 1984, writ granted).

317. 680 S.W.2d 831 (Tex. App.—Houston [1st Dist.] 1984, no writ).

318. 686 S.W.2d 309 (Tex. App.—San Antonio 1985, writ granted).

319. *Id.* at 315.

320. 678 S.W.2d 527 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

utory cause of action is limited to parents, children, and spouses.³²¹ The court stated that since there is no common law wrongful death cause of action, addressing the problem raised by this case is a matter for the legislature.³²²

321. *Id.* at 529-30.

322. *Id.*

